



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*The Silvio J. Mollo Building
One Saint Andrew's Plaza*

February 26, 2020

BY ECF

The Honorable Vernon S. Broderick
United States District Judge
United States Courthouse
40 Foley Square
New York, New York 10007

Re: ***United States v. Oneil Scott***,
16 Cr. 029 (VSB); 19 Cv. 3322 (VSB)

Dear Judge Broderick:

The Government writes in response to the defendant's timely petition for habeas relief. *See* Dkt. No. 63. The petition makes two arguments: (i) that counsel was ineffective for failing to file a notice of appeal from the judgment of conviction; and (ii) that the Court should credit the defendant's time spent in custody between 2016 and 2019 on a prior criminal case. The Government respectfully submits that the second argument should be denied as meritless. As to the first argument, however, because there is a valid argument that defense counsel should have filed an appeal, the Government believes that the best course of action is for the Court to vacate and re-enter its judgment, so that the defendant may file an appeal.

I. Ineffective Assistance of Counsel

The defendant argues that defense counsel was ineffective for failing to file a notice of appeal. It is undisputed that no appeal was filed in the defendant's case. On or about November 12, 2019, the Government received a declaration from defense counsel, discussing their communications with the defendant about filing a notice of appeal, attached as Exhibit A (the "Original Declaration"). After reviewing the Original Declaration, the Government asked for a supplemental declaration, setting forth further facts. On or about February 20, 2020, the Government received a supplemental declaration from defense counsel, attached as Exhibit B (the "Supplemental Declaration").

After reviewing both declarations, the Government believes that the defendant has a valid argument that he asked defense counsel to file a notice of appeal. The Government therefore believes that the best course of action is for the district court to vacate and then re-enter the judgment, thereby reopening the period for the filing of a direct appeal, so that the defendant may file an appeal. *See Garza v. Idaho*, 139 S. Ct. 738, 749-50 (2019) (holding that where an

attorney failed to file a notice of appeal despite defendant's request, prejudice is presumed without any further showing of the merits of the underlying claims, and regardless of whether the defendant signed an appeal waiver); *see also United States v. Fuller*, 332 F.3d 60, 65 (2d Cir. 2003) (remanding case with meritorious ineffective assistance of counsel claim, so that district court could "vacate the judgment and enter a new judgment from which a timely appeal may be taken").

II. Credit for Time Spent In Custody

The defendant's second argument, that the Court should credit the defendant's time spent in custody between 2016 and 2019 on a prior criminal case, has no merit and should be denied. As a preliminary matter, it is not clear that a habeas petition is the appropriate place to make this argument for the first time. But in any event, putting aside any procedural deficiencies, the argument can be denied on the merits.

a. Procedural History

In August 2014, the defendant was arrested and charged in the Southern District of New York with participation in a September 2010 gunpoint robbery of a marijuana dealer in the Bronx, New York. This robbery involved different individuals than the instant offense, and occurred three years before the beginning of the conspiracy charged in the instant offense. The defendant was detained during the pendency of the case. On November 24, 2014, the defendant pleaded guilty to conspiracy to commit robbery, in violation of Title 18, United States Code, Section 1951, with a Guidelines range of 63 to 78 months' imprisonment (the "2010 Robbery Conviction"). On April 21, 2015, the Honorable P. Kevin Castel sentenced the defendant to 63 months' imprisonment (the "2010 Robbery Sentence").

In January 2016, while serving the 2010 Robbery Sentence, the defendant was arrested in the instant case on charges relating to a series of robberies that he committed in 2014, as well as his participation in the kidnapping, attempted robbery, and murder of Wayne Thomas on March 11, 2014. The defendant faced a mandatory minimum sentence of life imprisonment plus seven years' imprisonment.

On December 23, 2016, the defendant appeared before this Court and pleaded guilty to Superseding Information S4 16 Cr. 029 (VSB), pursuant to a plea agreement (the "Plea Agreement"). (Presentence Report ("PSR") ¶¶ 5-6). The defendant pleaded guilty to two counts: participating in a robbery conspiracy from 2013 to 2014; and conspiring to kidnap Wayne Thomas in March 2014. In the Plea Agreement, the defendant and the Government stipulated that the defendant was in Criminal History Category II and that an offense level of 43 applied to his conduct, resulting in a stipulated Guidelines sentence of life imprisonment. (*Id.* at ¶ 6). There was no mandatory minimum. The Plea Agreement accorded three criminal history points to the 2010 Robbery Conviction.

In advance of the defendant's sentencing, the Probation Office prepared its Presentence Report ("PSR"). The Probation Office reached the same conclusion that was stipulated in the Plea Agreement: that based on an offense level of 43 and a Criminal History Category of II, the

applicable Guidelines sentence was life imprisonment. (*Id.* at ¶ 124). The PSR accorded three criminal history points to the 2010 Robbery Conviction, as the Plea Agreement also had, with no objection from the defendant.

The sentencing took place on February 25, 2019. The Court began the sentencing by confirming that defense counsel had reviewed the PSR with the defendant. (Ex. C, Sent. Tr. 5-6). The Court also confirmed that neither party had any objections to the PSR, and adopted the PSR's Guidelines calculation. (*Id.* at 6). The Government then spoke and urged the Court to impose a Guidelines sentence of life imprisonment, noting, among other things, the defendant's long history of violent crimes. (*Id.* at 11-14).

The Court asked the Government whether, given the 2010 Robbery Sentence, the defendant was getting credit in the instant case for the time that the defendant was currently in jail. (*Id.* at 18). The Government stated that that would depend on whether the Court decided to run the sentence in the instant case consecutively or concurrent to the 2010 Robbery Sentence. (*Id.*). The Court clarified that the defendant had been sentenced to 63 months' imprisonment in the 2010 Robbery Sentence, and asked when the defendant would complete the 2010 Robbery Sentence. (*Id.* at 19). Defense counsel, after conferring with the defendant, stated that the defendant believed that he would finish serving the 2010 Robbery Sentence on May 14, 2019. (*Id.*). The Government also reiterated its position that the 2010 Robbery Conviction was not relevant conduct in the instant case, because it concerned different robberies committed by different actors at a different time. (*Id.* at 29-30).

After clarifying this issue, the Court heard from defense counsel and the defendant, and discussed the sentencing factors at length. (*Id.* at 31-38). The Court then imposed a sentence of 300 months' imprisonment, to run consecutively to the 2010 Robbery Sentence. (*Id.* at 38-39).

b. Discussion

The defendant now argues that the Court should have given him credit at sentencing for the time that he had already spent in custody on the 2010 Robbery Sentence, because it was relevant conduct that was part of the investigation in the instant case. But as noted by the Government at the defendant's sentencing in the instant case, without any objection from the defendant, the 2010 Robbery was not relevant conduct. The 2010 Robbery Conviction and the instant case involved different robberies, committed at different times, with different coconspirators. The 2010 Robbery Conviction is therefore not relevant conduct, as the Court knew and took into account when imposing its sentence, which it deliberately chose to run consecutively to the 2010 Robbery Sentence. *See* U.S.S.G. § 5G1.3(d) (policy statement noting that if the defendant is serving an undischarged term of imprisonment for conduct that was not relevant conduct, the Court may impose the new sentence on the instant offense "to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense").

The defendant also argues that he should have received credit for the time that he had spent in custody on the 2010 Robbery Sentence in the instant case, pursuant to 18 U.S.C. § 3585(b). But this argument should be addressed to the BOP, not the district court, as it is the

BOP that calculates whether any time should be credited under Section 3585(b). *See United States v. Wilson*, 503 U.S. 329, 334 (1992). Further, the defendant is not eligible for credit under Section 3585(b). Section 3585(b) states that a defendant shall be given credit for time spent in official detention before his sentencing if that time “has not been credited against another sentence.” 18 U.S.C. § 3585(b). The time that the defendant spent in custody between 2014 and his sentencing in the instant case was credited against the 2010 Robbery Sentence. The Court was clear that the sentence in the instant case should run consecutively to the 2010 Robbery Sentence. Section 3585(b) therefore is not applicable here.

Conclusion

The Government respectfully requests that the Court (i) hold that the defendant’s arguments regarding credit for time served have no merit; and (ii) vacate and re-enter the judgment of conviction, so that the defendant may file an appeal, if he still desires to do so.

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney

By: /s/ Margaret Graham
Christopher J. DiMase
Margaret Graham
Jessica Feinstein
Assistant United States Attorney
Southern District of New York
(212) 637-2433/ -2923/ -1946

cc: Bobbi Sternheim and Grainne O’Neill, Esqs. (by ECF)
Oneil Scott, Register # 66195-019 (by United States mail)

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA

16 Cr. 29 (VSB)
19 Cv. 3322 (VSB)

-against-

DECLARATION

O'NEILL SCOTT,

Defendant.

-----X

BOBBI C. STERNHEIM, pursuant to 28 U.S.C. § 1746, declares the following under penalty of perjury:

1. I am an attorney admitted to practice before this Court and counsel appointed to represent O'Neill Scott pursuant to the Criminal Justice Act.
2. I submit this declaration pursuant to court order in response to claims alleged by Mr. Scott in his motion pursuant to 28 U.S.C. § 2255.
3. In alleging ineffective assistance of counsel, Mr. Scott states that counsel failed to file a notice of appeal, that the robbery he committed in 2010 is relevant conduct to the robberies he committed in 2014, and that he is entitled to credit for the time served during detention on the present case while serving a federal sentence imposed in 2014.
4. In 2014, the Honorable P. Kevin Castel sentenced Mr. Scott to a term of imprisonment of 63 months following his guilty plea to a 2010 Hobbs Act robbery conspiracy charged in Indictment 14 Cr. 260 (PKC).

5. Two years later, Indictment 16 Cr. 29 (VSB) charged Mr. Scott and two co-defendants with offenses that occurred in 2014: conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, conspiracy to commit kidnapping, and use of a firearm in furtherance of a crime of violence.

6. After review of Rule 16 discovery revealed no connection between the 2010 robbery and the 2014 robbery conspiracy, defense counsel conferred with the government to determine whether the 2010 robbery constituted conduct relevant to the 2014 robbery. The government confirmed that the 2010 robbery was not related to the 2014 offenses.

7. Counsel informed Mr. Scott that the issue regarding relevant conduct was investigated, that counsel could find no evidence of relationship between the 2010 robbery and the 2014 offenses, and that the government confirmed, based on its evidence, that the prior robbery did not constitute relevant conduct.

8. Possessed with this information, Mr. Scott entered a guilty plea pursuant to a plea agreement that contained an appeal waiver:

It is agreed (i) that the defendant will not file a direct appeal; nor bring a collateral challenge, including but not limited to an application under Title 28, United States Code, Section 2255 and/or Section 2241 ; nor seek a sentence modification pursuant to Title 18, United States Code, Section 3582(c), *of any sentence at or below the Stipulated Guidelines Sentence of life imprisonment*, and (ii) that the Government will not appeal any sentence at or above the Stipulated Guide lines Sentence. (Plea agreement, page 7; emphasis added.)

9. On February 25, 2019, this Court sentenced Mr. Scott to a total term of 300 months “consecutive to the undischarged term of imprisonment that Mr. Scott is currently serving.” (Sentencing Transcript, page 39.)

10. During sentencing, the government confirmed that the 2010 robbery was not relevant conduct:

It's the government's position that the 2010 robbery to which Mr. Scott pled guilty and was ultimately sentenced by Judge Castel in 2014 - - is not relevant conduct, right and there are three criminal history points assessed in the PSR. And we also submit that the policy statement 5G1.2 discussing the consequence of certain prior conduct being relevant conduct for sentencing purposes would not apply because we don't view it as relevant conduct, and I would just note it's far outside the window of the charged conspiracy, 2010 versus 2013, '14; and also, based on the government's investigation, it involved different sets of actors, different people involved in the 2010 robbery than were involved in the 2013 and '14 robbery conspiracy that's charges in this indictment. (Sentencing Transcript, pages 29-30.).

11. Mr. Scott mischaracterizes the present indictment as a "superseding indictment." It is a separate indictment alleging crimes committed in 2014 that are unrelated in time and scope to the 2010 robbery charged in the 2014 indictment

12. Relying on 18 U.S.C. § 3585(b) and asserting that the 2010 robbery is relevant conduct, Mr. Scott is seeking credit for time served in detention on the present case while serving his federal sentence for the prior, unrelated case.

13. By writ, Mr. Scott was transferred from federal prison ,where he was serving his 2014 sentence, to the Metropolitan Detention Center (MDC), where he was detained during the pendency of the instant case. Upon information and belief, the time spent in the MDC was credited to Mr. Scott's 2014 sentence.

14. Mr. Scott contends that pursuant to § 3585(b) he should also receive credit toward his 2019 sentence.

15. Section 3585(b) does not permit double credit: “A defendant shall be given credit toward [his] term of imprisonment for any time he has spent in official detention prior to the date the sentence commences” if such time “*has not been credited against another sentence.*” (Emphasis added.)

16. In or about March 26, 2019, some four weeks after sentence was imposed, Mr. Scott sent a Corrlinks email to co-counsel Grainne E. O’Neill, Esq.:

i do not wish to appeal the sentence what I want to appeal is the decision that the Judge made about my time that I have served that I am entitle [sic] to. I am only asking that we make a motion on that issue, so the sentence is not my worry. I have accepted responsibility already and was willing to face my punishment. Let me know if we can put in the argument for my time credit from January 22, 2016 until my sentence date of 2019 ... thank you!!! (Emphasis added.)

17. Mr. Scott voluntarily entered a guilty plea with the knowledge and understanding that he faced a possible life sentence and could not appeal that stipulated guideline sentence. The government sought a life sentence. The Court imposed a sentence of 300 months (25 years).

18. Under the terms of his plea agreement, Mr. Scott waived the right to appeal his sentence.

19. Mr. Scott is not eligible for relief pursuant to § 3585(b).

20. Further, as the Supreme Court has held, it is the Attorney General, not the District Court, who computes the amount of § 3585(b) credit after the defendant has begun to serve his sentence. *United States v. Wilson*, 503 U.S. 329, 331-337 (1992).

21. If Mr. Scott persists in his belief that he is entitled to credit pursuant to § 3585(b), he may petition the Attorney General for relief.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on November 12, 2019

/s/ Bobbi C. Sternheim

BOBBI C. STERNHEIM, ESQ.

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA

-against-

16 Cr. 29 (VSB)
19 Cv. 3322 (VSB)

O'NEILL SCOTT,

Defendant.

SUPPLEMENTAL DECLARATION

-----X

BOBBI C. STERNHEIM, pursuant to 28 U.S.C. § 1746, declares the following under penalty of perjury:

1. I am an attorney admitted to practice before this Court and counsel appointed to represent Oneill Scott pursuant to the Criminal Justice Act.
2. I make this supplemental declaration in response to the claim of ineffective assistance of counsel alleged by Mr. Scott in his motion pursuant to 28 U.S.C. § 2255.
3. On February 25, 2019, the Court imposed sentence for Mr. Scott; the judgment was filed on March 15, 2019.
4. Mr. Scott's first mention to counsel of a notice of appeal was made in a Corrlinks email to co-counsel Grainne E. O'Neill, Esq., received on or about March 25, 2019, one month after sentence was imposed:

hey ms. grainne
i am currently writing you *to ask you if you was aware of filing a notice of appeal within the time frame applied by the court ?* the reason why i ask is because i have reasons to believe that i can ask the courts to at least reimburse me with some of my time credit that i have served due to this situation. i am not asking for the full amount, i am only asking for the time i have been here in mdc, which is 3 years and some change. *i think with the proper argument the court may impose the concurrent sentence.* let me know as soon as possible...thanking you in advance for your time and consideration!!!

(Original text) (emphasis added).

5. In a Corrlinks email to co-counsel Grainne E. O'Neill, Esq., received on or about March 28, 2019, Mr. Scott stated:

i do not wish to appeal the sentence what I want to appeal is the decision that the Judge made about my time that I have served that I am entitle [sic] to. I am only asking that we make a motion on that issue, so the sentence is not my worry. I have accepted responsibility already and was willing to face my punishment. Let me know if we can put in the argument for my time credit from January 22, 2016 until my sentence date of 2019 ... thank you!!!

(Original text) (emphasis added).

6. In a Corrlinks email sent to Mr. Scott on or about March 28, 2018, Ms.

O'Neill stated:

Hi yes and I forwarded everything to Bobbi but I don't really know what to do because you can't appeal the judge's order to run the sentences consecutive without appealing the sentence. Bobbi is going to take care of it but we are also outside the 15 day window to appeal. I'm sorry.

7. In a Corrlinks email to Ms. O'Neill, dated March 28, 2019, Mr. Scott stated:

i understand that bobbi is going to take care of the situation but what im concerned about is getting my 3 years which i think is a good argument to put in front of the judge due to same relevant conduct which the law requires. i also understand that you and bobbi as my attorneys where suppose to put in a notice of appeal (NOI) regardless if i wanted to appeal my sentence or not. that is your job, to notify the courts of my appeal rights in the future. anything can happen within 25 years that may benefit me.

(Original text) (emphasis added).

8. I recall reviewing my notes to confirm that the issue of credit for time served for this case while in the MDC was raised by counsel and addressed by the Court during the sentencing proceeding.

9. Mr. Scott's emails - sent 30 days after sentencing and 10 to 13 days after the filing of the judgment – were neither directives nor demands to file a notice of appeal. They were requests to ask the sentencing judge, not the Circuit, to give him credit for time served in the MDC for the present case while serving his prior, unrelated federal sentence, a request previously made during the sentencing proceeding.

10. Mr. Scott incorrectly suggests that counsel is “suppose[d] to put in a notice of appeal,” regardless of whether he wishes to appeal his sentence, as a placeholder should he be entitled to relief during the pendency of his sentence.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on February 19, 2020

_____/s/_____

BOBBI C. STERNHEIM, ESQ.

EXHIBIT C

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

16 Cr. 29 (VSB)

5 ONEIL SCOTT,

6 Defendant.

Sentencing

7 -----x
8 New York, N.Y.
9 February 25, 2019
11:08 a.m.

10 Before:

11 HON. VERNON S. BRODERICK,

12 District Judge

13 APPEARANCES

14 GEOFFREY S. BERMAN

15 United States Attorney for the
16 Southern District of New York

17 BY: CHRISTOPHER J. DiMASE

MARGARET S. GRAHAM

Assistant United States Attorneys

18 LAW OFFICES OF BOBBI C. STERNHEIM

19 Attorneys for Defendant

20 BY: BOBBI C. STERNHEIM, ESQ. GRAINNE O'NEILL, ESQ.

O'NEILL/HASSEN

21 Attorneys for Defendant

22 BY: GRÁINNE O'NEILL, ESQ.

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(Case called)

THE DEPUTY CLERK: Will counsel please state their appearances for the record.

MR. DiMASE: Good morning, your Honor. Christopher DiMase and Margaret Graham for the government.

THE COURT: Okay. Good morning.

MS. STERNHEIM: Good morning, Judge. Bobbi C. Sternheim and Gráinne O'Neill for Mr. Scott, who is present at counsel table.

MS. O'NEILL: Good morning.

THE COURT: Okay. Good morning.

And good morning, Mr. Scott.

You may be seated.

So this is a continuation of a sentencing which I think we began on November 15th.

Now, Mr. Scott, if at any point in time you don't understand something I'm saying or you'd like additional time to speak to your attorneys, just let me know and I'll stop the proceedings and I'll allow you to do that, okay?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. Now in connection with today's proceeding, let me review for the parties the materials that I've received. I've received the presentence report, which is dated February 23rd of 2017, and was revised on March 23rd of 2017; I have the defendant's sentencing submission which is

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1 dated November 1st, which includes various letters including
2 from Mr. Scott, from friends, family members, the mothers of
3 his children, from Elaine Robinson, who helped raise Mr. Scott,
4 a friend of the defendant's mother -- I'm sorry -- who helped
5 raise you, and your sister, as well as various certifications
6 from the Bureau of Prisons, work performance ratings, and I
7 note that some of the letters I think were letters that had
8 been also submitted in connection with the earlier case before
9 Judge Castel. I have the government's sentencing letter dated
10 November 7th of 2018. I've also reviewed the sentencing
11 transcript from the earlier sentencing before Judge Castel, the
12 sentencing submission submitted in that case, as well as the
13 government's letter from that case. As I mentioned the last
14 time, since those materials had not been -- I had not indicated
15 to the parties in advance of our last appearance, I provided a
16 copy of those materials to the parties.

17 After I adjourned the sentence the last time, I issued
18 an order on November 23rd of 2018. The government responded to
19 that order by letter dated February -- it says 2018, but I
20 think it was probably 2019. I mean, it was 2019.

21 MR. DiMASE: Yes, your Honor. Apologies for that.

22 THE COURT: No, that's fine.

23 And a defense letter addressing my order, which is
24 dated February 19th of 2019.

25 The defense also submitted a letter on February 20th

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1 of 2019, which attached a work performance rating from the BOP,
2 which I think is for a later period. It looked like it was
3 from September 2017 to the present.

4 Are there any other submissions I should have in
5 connection with today's sentencing?

6 MR. DiMASE: Your Honor, I only note this because it's
7 something the Court brought up at the last proceeding.
8 Attached to the government's letter of February 12, 2019 was
9 the one letter that the Court had requested.

10 THE COURT: Yes.

11 MR. DiMASE: So we did include that.

12 THE COURT: All right. So just to be clear, at the
13 last sentencing I had asked for I think a letter from a young
14 woman who had been Mr. Scott's fiancée, which I believe the
15 letter had been handed up to Judge Castel at the last
16 sentencing, and the government indicated it had a copy and did
17 attach a copy of that letter to its letter in response to my
18 order. So I do have that. I do have that document.

19 MR. DiMASE: There is nothing else the government is
20 aware of.

21 THE COURT: All right. Ms. Sternheim.

22 MS. STERNHEIM: Your Honor, there is nothing
23 additional.

24 THE COURT: I should mention, however, although I
25 didn't have a copy, Ms. Sternheim, you referred to a

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1 psychological evaluation in your submission, and although I
2 don't have the actual report, I think you have summarized the
3 findings of Ms. -- I apologize --

4 MS. STERNHEIM: Carmeta Albarus.

5 THE COURT: -- Ms. Albarus in that. So I should
6 mention that also.

7 Ms. Sternheim, have you read the presentence report
8 and discussed it with Mr. Scott?

9 MS. STERNHEIM: Yes, both Ms. O'Neill and I have
10 reviewed it with Mr. Scott.

11 THE COURT: Okay. Mr. Scott, have you read the
12 presentence report?

13 THE DEFENDANT: Sure, your Honor.

14 THE COURT: And have you discussed it with your
15 attorneys?

16 THE DEFENDANT: Sure, your Honor.

17 THE COURT: And have you had an opportunity to go over
18 with them any errors in the report or anything else that you
19 believe should be taken up with me?

20 That's okay. You can remain seated. You just need to
21 speak into the microphone. That's fine.

22 THE DEFENDANT: No, your Honor. We already go through
23 it, sir. Thank you.

24 THE COURT: I'm sorry. You've already gone through
25 it?

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1 THE DEFENDANT: Yeah, we already went through it and
2 there's no mis -- error.

3 THE COURT: Okay. All right. Thank you.
4 Ms. Sternheim, do you have any objections to the presentence
5 report?

6 MS. STERNHEIM: No.

7 THE COURT: Does the government have any objections?

8 MR. DiMASE: No, your Honor.

9 THE COURT: Okay. So I'm going to adopt the factual
10 findings in the report, and the presentence report is going to
11 be made part of the record in this case. It will be placed
12 under seal. However, counsel on appeal may have access to the
13 report without further application to me or one of my
14 colleagues.

15 Now, Mr. Scott, you may recall that when you pled
16 guilty back in December of 2016 before me, I mentioned a set of
17 rules called the Sentencing Guidelines. Now those are rules
18 that are designed to assist judges like myself when we impose
19 sentence on individuals convicted of crimes. Now the
20 guidelines at one point in time had been mandatory, which would
21 have meant I would have had to apply them in just about every
22 case and could only depart or vary from them in very limited
23 circumstances. However, they're no longer binding. However, I
24 must consider them as part of my determination of what an
25 appropriate sentence is for you. So I'm still required, as I

J2plscos

1 said, to consider the guidelines, but the guidelines really
2 just amount to a starting point for me. So the first task that
3 I have to undertake is to calculate the guidelines and make
4 sure that I've done so accurately.

5 So Count One charges you with conspiring to commit
6 robbery. In connection with that, you admitted to
7 participating in six robberies.

8 Count Two charges you with conspiracy to commit
9 kidnapping, and in connection with that charge, as a result of
10 the kidnapping conspiracy, there was in fact a kidnapping, and
11 you admitted at the time of your plea to attempting to obtain
12 information from Wayne Thomas through use of violence and that
13 Wayne Thomas died as a result of the efforts to obtain
14 information. You and the co-conspirator, I should say.

15 Now since you pled guilty to the robbery conspiracy,
16 which involved six robberies, each robbery will be treated
17 separately. So although the robberies can be grouped as part
18 of Count One, they can't be grouped with each other. However,
19 Count Two can be grouped with the sixth robbery, since they
20 involve the same victim and common criminal objective or were
21 part of a common plan or scheme. Therefore, there's going to
22 be a total of six groups that are used to determine your
23 offense level:

24 Group 1, which is basically Count One, robbery one,
25 the base offense level is 20. There are five levels that are

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1 added to that because a firearm was possessed in connection
2 with that robbery. One level is added because the taking of
3 the controlled substance was the object of the offense. Since
4 you were considered an organizer, leader, or manager or
5 supervisor, two points are added to that. And the adjusted
6 offense level becomes a 28.

7 Group 2, which consists of -- again, it's Count One
8 but the second robbery, again, the base offense level is 20.
9 Five levels are added to this because there was a firearm
10 possessed. Two levels are added to that because the victim
11 sustained bodily injury in connection with that robbery. The
12 victim was abducted to facilitate the offense, or the
13 commission of the offense, I should say, so four levels are
14 added to that. One level is added because, again, the offense
15 involved the taking of a controlled substance or attempted
16 taking of a controlled substance. You were also a manager,
17 supervisor in connection with this offense, so three levels are
18 added to that. And the adjusted offense level becomes 35.

19 Now Group 3 is for the third robbery, also with regard
20 to Count One. The base offense level again is 20. Five levels
21 are added for use of a firearm. One level is added because the
22 taking of a controlled substance was an object of the offense.
23 Since you're a manager or supervisor, three levels were added
24 to that. And the adjusted offense level becomes a 29 for that
25 group.

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1 For Group 4, which, again, is the fourth robbery, the
2 base offense level is 20. Two levels are added to that because
3 threat of death was made. Since you were an organizer, leader
4 or manager or supervisor, two levels were added to that, which
5 results in an adjusted offense level of 24 for Group 4.

6 Group 5, which is the fifth robbery, again, related to
7 Count One, the base offense level is 20. Five levels are added
8 because a firearm was possessed. One level was added to that
9 because the taking of a controlled substance was an object of
10 the offense. Since you were an organizer, leader, manager,
11 supervisor, two levels are added to that. And your adjusted
12 offense level for Group 5 is 28.

13 Now Group 6, which is a combination of the sixth
14 robbery and Count Two, now the guidelines for a violation of
15 Section 1951 and Section 1201(c) both contain a cross-reference
16 that states that the victim was killed under circumstances that
17 would constitute murder under 18 United States Code
18 Section 1111; had such a killing taken place within the
19 territorial maritime jurisdiction of the United States, that
20 2A1.1 would apply. Therefore, the base offense level for this
21 group is 43. Since you're a manager or supervisor in
22 connection with this offense, three levels are added to that,
23 making the adjusted offense level 46.

24 Since all of the other groups are much less than Group
25 6 -- well, let me say it this way. None of the groups except

J2plscos

1 Group 6 get the unit, and that's because they're substantially
2 less in terms of their offense level, and therefore there's no
3 increase in the highest offense level, which is 46. Three
4 levels are subtracted from that, for acceptance of
5 responsibility, and therefore, your offense level becomes a 43.

6 You have three criminal history points, which results
7 in a criminal history category of II. And the resulting
8 guideline range is life.

9 The maximum fine is 25,000 to \$250,000.

10 Do the parties agree that the Sentencing Guideline
11 range is life and that I've accurately calculated Mr. Scott's
12 guidelines?

13 MR. DiMASE: Yes, your Honor.

14 THE COURT: All right. Ms. Sternheim?

15 MS. STERNHEIM: Yes.

16 THE COURT: All right. Now with regard to whether or
17 not there are any departures that would be appropriate here, I
18 have considered whether there is a basis to depart from the
19 guidelines, and although I know I have the power to depart, I
20 find that there is no basis to depart under the circumstances
21 here.

22 Now I'll hear from the parties.

23 First, does the government wish to be heard with
24 regard to sentencing?

25 MR. DiMASE: Judge, very briefly.

J2plscos

1 THE COURT: Yes.

2 MR. DiMASE: I don't want to belabor points that we've
3 raised already. There's been a lot of briefing here because of
4 the Court's questions in its order and the government's
5 original submission.

6 This is a defendant who has engaged in violent
7 criminal activity over a long period of time. In the
8 government's view, something like this happening in the course
9 of these robberies was inevitable. And when you routinely are
10 using loaded firearms to beat and threaten, brandish against
11 victims, when you are tying them up, restraining them in an
12 effort to get their property, eventually something like this is
13 bound to happen. And it did. And instead of -- not that there
14 was any right way to deal with it at that stage. This was a
15 horrendous crime. The victim was brutally kidnapped and beaten
16 and ultimately kidnapped and taken to a different location,
17 where he was beaten further. Ultimately, when the victim was
18 killed, rather than addressing that situation, reporting it,
19 maybe that's too much to expect, but they did just the
20 opposite, and that effort was really led by Mr. Scott -- the
21 effort to kidnap this victim in the first place and the effort
22 to cover up the crime after the fact, which not only, as we
23 noted, desecrated Mr. Thomas's body in a horrendous way but
24 also put other lives at risk, still more lives at risk by
25 setting ablaze the victim's car in a crowded urban neighborhood

J2p1scos

1 where it could have easily caused the death of many more people
2 by setting structures on fire that were in that area. It's
3 hard to imagine a more significant course of conduct being
4 capped by a more significant offense. I think that this is the
5 kind of case that a life sentence was made for -- a person who
6 has demonstrated, through a course of violent conduct, that
7 they have no regard for other people's lives or the law and who
8 ultimately takes part in an incredibly violent offense, not an
9 offense where somebody is killed in a flash but beaten
10 mercilessly over hours and then strangled to death and then
11 left to burn in their own car. I mean, these are just facts I
12 think that are difficult to reckon with, and for the family,
13 impossible to face I think for the rest of their lives. And
14 those are the kind of facts that really truly do merit a life
15 sentence.

16 Mr. Scott was given an opportunity here to plead
17 guilty to a nonmandatory life sentence, to give the Court the
18 ultimate decision about what the appropriate sentence is, but
19 we strongly believe that the guidelines sentence here of life
20 imprisonment is appropriate, and I think all of the additional
21 facts that we answered, all the additional questions we
22 answered point to that same outcome. I don't think any of the
23 answers that the government provided to the Court's questions
24 really point in any other direction here.

25 I do want one moment, if you wouldn't mind, your

J2p1scos

1 Honor. I think we may have some of the victim's family members
2 in the courtroom. I'm not sure about that. I want to see one
3 way or the other. And I want to see, if there are any such
4 victim family members, whether they have an interest in
5 addressing the Court.

6 THE COURT: Okay.

7 MR. DiMASE: One moment.

8 THE COURT: Yes.

9 (Counsel conferring)

10 MR. DiMASE: Your Honor, I haven't actually met the
11 victim's family. I checked with defense counsel to figure out
12 who the folks are, and they're all members of Mr. Scott's
13 family, so my understanding is there are no victim's family
14 members here today.

15 THE COURT: Okay.

16 MR. DiMASE: If I could have just one moment.

17 THE COURT: Sure.

18 And I take it in connection with the sentencing that
19 the government hasn't received, or the victim witness
20 coordinator at the U.S. Attorney's Office hasn't received
21 anything from the victim's family members.

22 MR. DiMASE: Your Honor, that is my understanding. I
23 do recall that earlier on in this case, we had been in touch
24 with the victim's family. One problem was that the sentencing
25 was adjourned a number of times.

J2p1scos

1 THE COURT: Yeah.

2 MR. DiMASE: And I think that caused some friction
3 with the victim's family in terms of making plans to come and
4 then being told that the case had been adjourned.

5 I do recall that early on in the capital case process,
6 we did reach out to the victim's family about their views on
7 the death penalty, and my recollection is that they did not
8 think the death penalty would be appropriate, and that was a
9 consideration in terms of the ultimate decision in the capital
10 case context.

11 The only other thing I would mention is that we have
12 been in touch back and forth with the victim's family about
13 restitution for funeral and burial costs for Mr. Thomas, which,
14 as the Court is aware, is mandatory under the statute. I
15 believe where things left off is we were still waiting for any
16 documentary evidence of the costs, and we had not gotten that
17 from the family. So we would ask the Court to impose
18 restitution for the amount of those costs. It is possible they
19 were covered by another victim rights organization and
20 therefore they wouldn't be entitled to it here, and we can let
21 the Court know by letter within the 90-day period after
22 sentencing whether or not there are any such costs and ask the
23 Court to impose that restitution formally if there are.

24 THE COURT: Okay. I think that makes sense that
25 within the 90-day period the government provides that

J2plscos

1 information. Obviously speak with Ms. Sternheim as you're
2 gathering that stuff, if you're going to provide me with a
3 restitution order at that point.

4 MR. DiMASE: Very good.

5 I know the Court had a number of questions, as set
6 forth in the Court's order that we responded to by letter. I'm
7 happy to answer any other questions the Court might have at
8 this point.

9 THE COURT: I think that the letter was very helpful,
10 and I appreciate both parties indulging my questions. But let
11 me ask this.

12 MR. DiMASE: Yes, your Honor.

13 THE COURT: Because I think I know the answer to this
14 question. Aren't there cases that involve intentional
15 murders -- and here, I mean, there may be some dispute about
16 that, but -- actual intentional murders where the government
17 offers and in fact are pled out for a term of years and not
18 life? In other words, whether that's 20, 25, 30, whatever it
19 may be, for murders?

20 MR. DiMASE: Your Honor, I'm aware of cases where the
21 government has entered into an agreement where there was a, for
22 example, a 30-year mandatory minimum sentence, which was made
23 up of some combination of 924(c) firearms offenses and where
24 the guidelines sentence was that mandatory minimum sentence and
25 where the maximum sentence was life so that the judge could

J2plscos

1 obviously impose the guidelines and mandatory minimum sentence
2 or could impose a sentence up to life; and that those sorts of
3 sentences are sometimes imposed in cases where there is an
4 allegation of intentional murder and not merely felony murder.

5 On the point of the dispute over the facts of this
6 particular case, there was obviously a significant beating that
7 happened of Mr. Thomas over the course of this event.

8 THE COURT: Yes.

9 MR. DiMASE: And there is some question, obviously,
10 based on the medical examiner's information, about what exactly
11 was the ultimate cause of death or whether it may have been a
12 combination of the beating that was inflicted on him and
13 asphyxiation from a chokehold. Mr. Scott directly participated
14 in, based on the government's evidence, in the beating of
15 Mr. Thomas at the house in Brooklyn where he was kidnapped and
16 brought to. And based on what we know so far from the medical
17 examiner, which may be all we ever know, because of the burn
18 injuries that were sustained, those appear to have been at
19 least partially the cause of the victim's death.

20 Was it intentional? Was the goal to kill him? I
21 think the witnesses would say the goal was to cause him to
22 provide information about the location of drugs and money, but
23 everybody knows when you kick somebody in the head repeatedly,
24 beat them with a gun, that death is a possible outcome of that
25 conduct.

J2plscos

1 But, you know, just to pull out to a 30,000-foot view
2 on this, ultimately it's not just about this one incident.
3 This incident is horrific. You know, the coverup is horrific
4 as well, and I think that is an important distinguishing factor
5 from maybe other cases where the murder is intentional but
6 there isn't a coverup that involves moving the victim's car,
7 putting the body in the car, burning the car, and putting other
8 lives at risk.

9 On top of that you have numerous other very violent
10 robberies, some of which involved the restraint of victims
11 which could have easily resulted in the same outcome, that are
12 part of this set of facts that the Court is dealing with.

13 And the strength of the evidence I think is an issue
14 as well. I mean, I'm not privy to the facts of every case and
15 the strength of the evidence in every case where the government
16 has made a particular kind of offer. Here, the government has
17 what it views as a very strong case, and it also had a count in
18 the indictment that carried a mandatory life sentence, so I
19 think that set of facts, the particulars about this murder and
20 the kidnapping and the coverup, the fact that Mr. Scott was
21 involved in so many other violent robberies and was, based on
22 the government's evidence, a leader of this crew that committed
23 numerous robberies, the fact that he faced a mandatory life
24 term otherwise in the indictment, and the fact that the
25 government had very strong proof of the defendant's involvement

J2plscos

1 in these crimes, all, in our view, add up to an appropriate
2 sentence of life imprisonment in this case.

3 THE COURT: Okay. Let me ask, is it the government's
4 understanding that with regard to Mr. Scott, his current
5 situation, that he is not getting credit currently because of
6 the prior sentence, that he's not getting credit for the
7 instant offense? In other words, that on sentencing, he'll
8 begin to get credit for this offense, assuming, whether it's
9 concurrent or consecutive, but that he is not getting credit
10 for it?

11 MR. DiMASE: Well, I think your last point is really
12 what captures whether he gets credit or not. Ultimately I
13 think it's a matter for the Court to decide whether some or all
14 of the sentence imposed on this instant case runs concurrent to
15 the other sentence. Obviously I think the Court is going to
16 specify one way or the other, concurrent or consecutive.
17 You're asking retroactively.

18 THE COURT: Correct. In other words, yes. And I
19 don't know the answer to this. In other words, if what you're
20 saying is, if I say concurrent, that it will mean that he'll
21 get credit for all of the time, and I wasn't operating under
22 that assumption. But I don't know. I think I can be clear as
23 to what my intention is regarding any sentence, but I wasn't
24 sure as a legal matter what either would do. I understand what
25 a consecutive would do. It would mean that -- I think

J2plscos

1 Mr. Scott was previously sentenced -- I want to say 70 months.
2 Am I correct about that?

3 THE DEFENDANT: 63 months.

4 THE COURT: 63 months? -- 63 months before Judge
5 Castel. So I understand exactly what a consecutive sentence
6 would be. I mean, until he's completed the prior sentence, he
7 would still be -- well, let me ask: Do you know? Because it's
8 now -- it must be fairly close, I would guess. He was
9 sentenced in 2015, but arrested in 2014. Do you know whether
10 or not --

11 (Ms. Sternheim conferring with the defendant)

12 THE COURT: I think Ms. Sternheim may know.

13 MS. STERNHEIM: Mr. Scott believes that May 14th of
14 this year, coming year, 2019, would be the completion date.

15 THE COURT: Okay. That's helpful. All right.

16 MR. DiMASE: Your Honor, I think certainly the Court
17 has discretion regarding the remainder of the sentence, which
18 is obviously relatively small at this stage. It's only a few
19 months.

20 THE COURT: Right.

21 MR. DiMASE: I don't know that we know the answer to
22 whether the Court could run the sentence concurrent beginning
23 the day that Mr. Scott was charged. I'm not even clear what
24 the date would be. There's the date of the charging and then
25 there's the date of the writ of Mr. Scott here to this district

J2plscos

1 to be presented on the charge.

2 THE COURT: And to be clear, just by your comment, I
3 wasn't -- in other words, all I was asking was what would be
4 the effect of me saying concurrent versus consecutive in this
5 context, not necessarily that -- because obviously the
6 ultimate, I think I understand. And it's helpful to know when
7 the expiration date of the other sentence is.

8 MR. DiMASE: At a minimum, the concurrent sentence
9 would include obviously the remaining sentence on the other
10 case, and the question is whether it would cover anything
11 before today, and I think you're right that the best the Court
12 can do is to express its view as to how it thinks a concurrent
13 sentence should work and let the BOP attempt to facilitate
14 that.

15 THE COURT: Yes.

16 Okay. Does the defense wish to be heard,
17 Ms. Sternheim?

18 MS. STERNHEIM: Yes, Judge. Thank you.

19 Your Honor, we certainly appreciate how complicated
20 this situation is, and we thank the Court for its attention to
21 it because it is somewhat difficult. But there are a couple of
22 things that I'd like to say in addition to our briefing, which
23 really speaks to the life of Mr. Scott.

24 The government made certain statements about
25 Mr. Scott's view of the law, or how he responds to being a

J2plscos

1 lawful citizen, and certainly the conduct he engaged in, there
2 is no excuse for it, but there is explanation.

3 But I would point out to the Court that when an
4 individual facing the kind of charges that Mr. Scott faces
5 decides to plead guilty in the face of -- which was not really
6 a plea bargain -- and your Honor has experience with the
7 office. It's not that I could go in there and just say, this
8 is what I would like for Mr. Scott. We got an offer. It was a
9 tough offer, and Mr. Scott knew that he needed to accept
10 responsibility for his conduct, and he did. There are many
11 cases that I have been in throughout the years, some with
12 Ms. O'Neill and some without, where we have faced very
13 difficult challenges, and frankly, we have gotten more
14 favorable dispositions even in cases where they were
15 intentional murders. But I'm not here to really belabor what
16 the ultimate plea was, because he does accept responsibility.
17 But sentencing somebody who has pled guilty to life sends a
18 terrible message not only to the individual, who knows that
19 that is a possibility, but to the defense bar and the clients
20 that we represent as to why should we not go to trial in each
21 and every case if, by pleading guilty and accepting
22 responsibility, our clients are facing the very same outcome
23 where they don't accept responsibility, they put the government
24 to a difficult task, and they use up not only judicial
25 resources for counsel fees but also for a long-winded trial.

J2plscos

1 And I just ask the Court to view this as sending a bad,
2 disparate situation where, in a very ugly felony murder case,
3 someone is treated as if he was an assassin who pled guilty.
4 And I have represented people in those kinds of cases. Your
5 Honor has sentenced people in intentional murder cases. And
6 there needs to be a reflection on the fact that he has pled
7 guilty.

8 There are tremendous enhancements here. We appreciate
9 that. But even if the Court were to take an average of all the
10 bump-ups and all the enhancements in this case, we're still
11 looking at over 31 years' imprisonment. And that should be one
12 form of the analysis that I ask the Court to look at. And
13 there are many cases where people have committed intentional
14 murder and have been sentenced to less than 30 years.

15 It is up to your Honor, obviously, to decide what is
16 appropriate here, but it is clear this was not an intentional
17 homicide. It is a very bad crime that was committed, terrible
18 situation for the victim here, and one view of it is a
19 situation where people freaked out and acted inappropriately.
20 But that in and of itself does not warrant a life sentence in
21 this case.

22 THE COURT: Just so I'm sure I understand, when you
23 say "acted inappropriately," you're talking about when they
24 realized that the victim had been killed --

25 MS. STERNHEIM: Yes.

J2p1scos

1 THE COURT: -- there was disposal of the body after
2 that.

3 MS. STERNHEIM: As you know, as the saying often goes,
4 the coverup becomes worse than what led to it, and I'm not
5 saying that that is worse, but it certainly was terrible, and
6 we don't excuse any of that.

7 But in sentencing a person, the judge, as you are,
8 balances the measure of the crime against the measure of the
9 man, and there is a lot that is very negative in Mr. Scott's
10 life, and not by his own choice. I don't know if your Honor
11 stayed up very late last night to watch the Academy Awards,
12 but --

13 THE COURT: I stayed up late, but not watching the
14 Academy Awards; I'll put it that way.

15 MS. STERNHEIM: Okay. And I only bring that to the
16 Court's attention because it was a very interesting and diverse
17 awards ceremony, and Regina King, who won supporting actress
18 for "If Beale Street Could Talk," gave a beautiful speech, and
19 in it she says: I am the example of what it looks like when
20 support and love are poured into someone. The exact opposite
21 is what we have here. Very, very little love, if any --
22 certainly there may have been kindness -- was poured into the
23 life of Oneil Scott. Very, very little support beyond
24 Mrs. Robinson letting him live with her, and his sister, and I
25 believe her daughter is here, and other family members who have

J2plscos

1 provided some support for which we are grateful for Mr. Scott.
2 But he is an example of what happens to someone when love and
3 support are not poured into a little boy, a teenager, a man.
4 We do not excuse any of his conduct, but I can say to you, and
5 Ms. O'Neill as well, these years that we have spent with
6 Mr. Scott have been quite extraordinary. We have had the
7 opportunity to, I hope, provide some of that affection and
8 support into this individual, and we have seen what he is
9 capable of in the most positive ways, how articulate he is, how
10 kind he is. To be in the MDC, which is a whole other issue
11 these days, and to have correction officer after correction
12 officer speak so positively of Mr. Scott, not only warms the
13 heart but also says how different this man is, not only in an
14 institutional environment but certainly in contrast to the very
15 terrible crimes that he committed and for which he has accepted
16 responsibility.

17 We are not asking this Court to sentence lightly, but
18 there is a sentence that is sufficient but not greater than
19 necessary, and a life sentence is far more greater than
20 necessary to mete out the purposes of sentencing. And we ask
21 your Honor to give him a sentence which will at one point in
22 his life let him get out, even if he is an older gentleman, to
23 be reunited with his children and his family.

24 And I will ask Ms. O'Neill if she wishes to say
25 anything, and I know that Mr. Scott has been waiting for the

J2plscos

1 opportunity to address the Court.

2 THE COURT: Okay.

3 MS. STERNHEIM: And I am available for any questions,
4 of course.

5 THE COURT: Thank you, Ms. Sternheim.

6 Ms. O'Neill.

7 MS. O'NEILL: I'll be very brief because I don't want
8 to repeat what Ms. Sternheim has said, but I was brought onto
9 this case to assist Ms. Sternheim in representing Mr. Scott
10 when it was still a pending death penalty case, and as I'm sure
11 your Honor is aware, when that is the status of the case, it is
12 very difficult for the defendant and family and loved ones to
13 appreciate that that's possible, that it exists in New York,
14 and that it's a very real possibility. And over the years that
15 I've had the opportunity to visit with Mr. Scott in prison, I
16 have seen a remarkable transformation. His smile, which you'll
17 probably not have occasion to see today, lights up a room
18 whenever I walk in. And I've seen him visiting with family in
19 the MDC and I've seen them talking and just engaged in a loving
20 and kind conversation in a way that is unusual in MDC. Many
21 people are filled with anger. Many people take that out on
22 their attorneys. Mr. Scott never did that. And I think that
23 part of that is probably his upbringing. He was born and
24 raised to not expect anything from anyone, to never expect a
25 moment of kindness, to never hope that someone would love him,

J2plscos

1 and what's unusual about him is that he came to this country,
2 and he sought out his family. He sought them out and he
3 reunited with them, and he became an important member of his
4 family and community.

5 And we can see that also in his children, in his
6 relationship with their mothers, which is unusual. Often when
7 people break up, there's a lot of animosity, and we don't have
8 that here. We have him being kind and trying to provide for
9 his children.

10 And I think that what I saw in his life when
11 Ms. Nelson died was horrifying. He was alone, he was in jail,
12 he couldn't get ahold of her, and as it turned out, she had
13 hung herself and was in her apartment for days. And I know
14 that he bears the scars of that emotional situation and that he
15 feels responsible for her death.

16 We know that the crime is horrible. We know that
17 Mr. Scott should never have been participating in robberies or
18 kidnappings or trying to get money from drug dealers. That's
19 not at all what he should have been doing, and he knows that,
20 and his family knows that. But what we do ask is that the
21 Court acknowledges the hardship that he suffered and can
22 balance that against the harms that he has committed.

23 Thank you.

24 THE COURT: All right. Thank you.

25 Before I hear from Mr. Scott, I have a question for

J2plscos

1 the government, and it just popped into my head. With regard
2 to Mr. Thomas, was Mr. Thomas actually involved in the drug
3 trade?

4 MR. DiMASE: Yes, your Honor.

5 THE COURT: Okay.

6 MR. DiMASE: Actually, two things on that point. When
7 you say involved in the drug trade, I think Mr. Thomas was
8 involved in robbing drug dealers just like Mr. Scott, and we
9 believe he obtained the drugs and essentially money that
10 Mr. Scott and his co-conspirators sought to steal, or rob from
11 him, in a separate robbery. Also, Mr. Thomas was friends with
12 Mr. Scott and other folks that were part of this robbery crew,
13 and they had actually committed robberies together in the past,
14 until he became the victim of this particular kidnapping and
15 robbery.

16 THE COURT: Okay. Thank you.

17 Mr. Scott, do you wish to be heard? You can remain
18 seated. Just pull the microphone -- that's good.

19 THE DEFENDANT: Good day, your Honor. I want to
20 apologize to you in advance if I become emotional.

21 Even though admitting to my bad action is the right
22 thing for me to do, it is painful to lay out all that I have
23 done.

24 When I had come into these robberies, I was not
25 thinking about the consequences to the victims, their families,

J2plscos

1 the court, my family, and the community. I did not think about
2 repercussions for my children. I did not think at all. I
3 wanted to believe that I was loyal and determined to provide
4 for my kids and protect those I love, but I did not do that. I
5 am so humble that my family continues to support me. Although
6 they have expressed support and love throughout all this, I am
7 clearly broken and failing them. This is what I deserve for my
8 bad actions.

9 I'm sorry. I am embarrassed, and I wish I had not
10 taken up the Court's time. I apologize to the officers, the
11 court staff, and to you, your Honor. I am ashamed. And even I
12 ask for forgiveness from the victim's family, but I am so sorry
13 to everyone in my community too, because I understand that
14 violence bring violence.

15 Since I have been in prison, I have realized how many
16 people I have made suffer. There is no excuse for my crimes.
17 I deeply regret what I have done. I have tried to atone by
18 participating in programs and learning how I can be the man I
19 wish I was all along. I know that change cannot be quick, and
20 it is hard, but I will not give up, because I want to become a
21 proper role model for my children in their lives. They are now
22 6 and 8 years old. While it may be impossible for others to
23 see the changes that I have made on my life, I know I am a
24 better man today than I was a few years ago. I can see who I
25 was, who I am, and who I want to be. Now I can see the things

J2plscos

1 that I was too blind to see while I was free. I deserve
2 punishment, and I ask to please give me an opportunity at some
3 point to be of help to those I love. I will not disappoint you
4 or society again.

5 I am very much aware of the time that my crimes carry.
6 I hope that my sentence will allow me to rebuild myself and not
7 leave prison a waste man, depending on the charity of my
8 family. No day goes by where I do not think about the hearts I
9 have broken or the people my actions have devastated,
10 especially the victim and his family. I take my incarceration
11 as an opportunity to turn a new chapter in my life.

12 I wish to say I love all my family and friends that
13 are here today to stand with me as I continue to become a
14 better man today. Thank you so much, your Honor.

15 THE COURT: Okay. Thank you, Mr. Scott.

16 Is there any reason why sentence should not be imposed
17 at this time? From the government?

18 MR. DiMASE: No, your Honor. We have just one more
19 point to raise.

20 THE COURT: Yes.

21 MR. DiMASE: And I'm not sure whether the Court
22 considered it or not. It's the government's position that the
23 2010 robbery to which Mr. Scott pled guilty and was ultimately
24 sentenced by Judge Castel in 2014 --

25 THE COURT: Was not relevant.

J2plscos

1 MR. DiMASE: -- is not relevant conduct, right, and
2 there are three criminal history points assessed in the PSR.
3 And we also submit that the policy statement 5G1.3 discussing
4 the consequence of certain prior conduct being relevant conduct
5 for sentencing purposes would not apply because we don't view
6 it as relevant conduct, and I would just note it's far outside
7 of the window of the charged conspiracy, 2010 versus 2013, '14;
8 and also, based on the government's investigation, it involved
9 different sets of actors, different people involved in the 2010
10 robbery than were involved in the 2013 and '14 robbery
11 conspiracy that's charged in this indictment.

12 THE COURT: Okay.

13 MR. DiMASE: In any event, with that in mind, no,
14 there is no reason why sentence cannot be imposed.

15 THE COURT: Ms. Sternheim, is there any reason why
16 sentence should not be imposed at this time?

17 MS. STERNHEIM: No, your Honor.

18 THE COURT: As I've stated, the guidelines here, the
19 guideline range results in life. Now under the Supreme Court's
20 decision in *Booker* and its progeny, the guidelines, as I
21 mentioned earlier, are just one factor that I must consider in
22 determining an appropriate sentence here. I'm also required to
23 consider the factors set forth in 18 U.S.C. Section 3553(a),
24 and I have done so. The factors include, but are not limited
25 to, the nature and circumstances of the offense and the

J2plscos

1 personal history and characteristics of Mr. Scott, since each
2 defendant must be considered as an individual. Judges are also
3 required to consider the need for the sentence imposed to
4 reflect the seriousness of the offense, promote respect for the
5 law, provide just punishment for the offense, afford adequate
6 deterrence to criminal conduct, and avoid unwarranted
7 sentencing disparities, among other things.

8 Now I note that the probation department here has also
9 recommended a sentence of life. And the government recommends
10 a sentence of life. Ms. Sternheim, you've requested that I
11 grant a substantial variance and impose a sentence of 20 years'
12 imprisonment, taking into account Mr. Scott's characteristics,
13 as well as the fact that he's been in prison since August of
14 2014.

15 So first I'll discuss the circumstances of the
16 offense. I think all parties have agreed here that this is an
17 incredibly serious offense, or offenses, I should say.
18 Participating in a conspiracy to commit robbery, admission to
19 six robberies in connection with that conspiracy, each of those
20 robberies involved one or more of the following: the use of
21 firearms; kidnapping; some level of violence or threat of
22 violence; and threat of death; and obviously the robbery of
23 Mr. Thomas resulted in his death. So in essence, you
24 participated in intimidating and terrorizing victims of the
25 robberies in order to obtain money and drugs, and in one

J2plscos

1 instance, a victim was injured; in the other, as I mentioned,
2 Mr. Thomas was beaten and killed. I think it's incredibly
3 serious conduct and conduct that is in many ways difficult to
4 comprehend. And in addition, I do also note that although not
5 intentional, in committing these crimes, there was a
6 likelihood, and perhaps a substantial likelihood, that
7 something like occurred to Mr. Thomas might occur.

8 Now the defense, in your submission, it indicates that
9 your life has been filled with violence and the struggle to
10 survive and that you justified your participation in the
11 robberies as acceptable in a world governed by the rule of
12 survival of the fittest, wherein you did not see drug dealers
13 as real victims. And I don't doubt that that may have been
14 your viewpoint at the time. However, I hope that you recognize
15 that that's a flawed viewpoint, and it's flawed for several
16 reasons. First -- and I accept the premise and I accept the
17 arguments that have been made that your life has been filled
18 with violence and a struggle to survive that I probably can't
19 really comprehend. And it's clear to me that your upbringing,
20 it's to your credit, but also something that I think merits
21 consideration, because it's clear that even with that violence
22 and your struggle to survive, you clearly, based upon the
23 letters I've read, are someone who people view as a good friend
24 and father, and many of the letters that have been written on
25 your behalf indicate that. So I guess what I would say is that

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1 obviously is a positive, and I'll talk about that in a moment
2 when I talk about your personal characteristics.

3 But what it also points out is that the criminal
4 activity and the violence were targeted and strategic, rather
5 than being a general part of your life. In other words, you
6 did not -- or at least there's nothing in the record to suggest
7 that the acts of violence were perpetrated against any of your
8 friends or family members.

9 And that leads to the second point, which is the fact
10 that just because someone may be a drug dealer does not make
11 them any less a victim. Obviously they do assume the risk to a
12 certain extent if they're involved in that trade, but that
13 doesn't mean they've consented in any way to being robbed or
14 kidnapped or beaten or pistol whipped and killed. And I think
15 perhaps, if you look at it this way, as the government
16 indicated, Mr. Thomas was in a similar sort of trade as
17 yourself. As they say, there but for the grace of god go I,
18 right? It could have been you, right, on that end? And I
19 don't know Mr. Thomas's specific situation in terms of his
20 family, but I imagine he has folks who care for him, may have
21 had kids, and the like, and so that's the other aspect of it,
22 and that's why it's sort of a flawed sort of logic, because in
23 many ways, you know, Mr. Thomas was much like yourself.

24 And finally, I do understand that someone who is
25 raised in the conditions that you were raised in -- and I'll

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1 get to the specifics of that in a moment -- that it's an
2 unbelievably difficult environment to escape from and not to
3 get wrapped up in that cycle of violence and the like.
4 However, there are folks who don't succumb to that. There's no
5 question that they have difficulty in their lives, but they
6 don't resort to that violence to survive, and to get by.

7 So first, the government had mentioned there were five
8 additional robberies in their recent letter that were just
9 based upon I think co-conspirator statements, largely. As the
10 government concedes, the robberies were largely based on a
11 single cooperator. Since you were not charged with those
12 robberies and the government hasn't sought to prove those
13 robberies in connection with a *Fatico* hearing, I'm not going to
14 consider any of those in connection with your sentencing.

15 I'm also not going to hold you responsible for the
16 marijuana and guns that were seized at the time of your arrest
17 in a Atlanta, although there's no question that there were guns
18 and marijuana found in that home. There is substantial
19 question about whose guns and drugs those were. And in fact,
20 as I understand it, some of the other folks who were in the
21 house pled guilty to those, to possessing the guns and the
22 drugs, so I'm not going to consider that as part of your
23 sentencing.

24 But now let me discuss your personal history and
25 characteristics.

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1 Now according to the presentence report and your
2 submission, there's no question you were raised in extremely
3 poor economic conditions in Jamaica. You became an orphan at
4 an early point in your life, I think around when you were 6
5 years old. Your father and mother died early in your life, so
6 you really did not have the contact with them growing up. A
7 friend of your mother's, Ms. Robinson, took you in and your
8 sister in and it appears raised you as her own and helped as
9 much as she could, based upon the meager existence that she was
10 able to eke out at the time. Ms. Robinson wrote letters on
11 your behalf, I think in connection with the prior sentencing.
12 I've read those letters. It's clear to me that she did care
13 for you and your sister, and in fact I believe, when she came
14 to the United States, continued to send food back to help care
15 for you.

16 Growing up, I understand that at times you didn't
17 actually know where your next meal would come from, and you had
18 to resort to stealing food in order to eat. I understand that
19 you dropped out of high school in about the tenth grade because
20 of various issues going on with your life at the time. And
21 there's no question that your childhood was -- well, I was
22 going to say a difficult childhood, but it might be fair to say
23 that you effectively didn't have what folks would view as a
24 normal childhood, perhaps. So I'm going to consider your
25 upbringing as a child and your economic circumstances growing

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1 up in Jamaica in determining what an appropriate sentence is
2 here.

3 I've read, as I said, all of the letters that have
4 been submitted to me, and, you know, it's clear to me that your
5 friends and family members -- and you have family members here
6 today -- that view you as a good friend, a caring person, and a
7 loving and some say doting father on your children. Many have
8 also commented that you're a hard worker, and they saw you
9 working as a barber and working as a party promoter. And so
10 I'll consider their views of your character in connection with
11 making a determination of what an appropriate sentence is for
12 you, but as I alluded to earlier, the person they describe is
13 in stark contrast to the person that, you know, committed the
14 crimes that you have pled guilty to, and that's not easy to
15 reconcile.

16 And I note, in the face of the government's prior
17 sentencing submission that -- well, you may recall I adjourned
18 the sentencing in part because when I read the prior sentencing
19 submission and your comments at your earlier sentencing, I'll
20 be frank with you, it gave me pause, because of some of the
21 things you said there, and by that, I mean, you know, at the
22 time I think the prosecution mentioned some of the crimes, the
23 very crimes that we're talking about here today, and you said
24 in response to that, "Well, as I stand before your Honor, and I
25 deny the vicious comments that the government have been said

J2plscos

1 about me in their sentencing letter, I've been in jail, locked
2 away from my children, almost certain to be deported as soon as
3 I serve your Honor's sentence. I ask the Court please to have
4 mercy, please. I'm not a violent person. I'm not -- I'm a
5 simple god-fearing individual, sir, your Honor, without any
6 criminal record at all, other than this incident right here,
7 Judge Castel, occurring almost five years ago, which I deeply
8 regret."

9 And the reason why it gave me pause is that that could
10 be viewed as not necessarily being truthful. I think,
11 Ms. Sternheim, you referenced this, that there were other ways
12 that -- Mr. Scott, you didn't need to make statements about the
13 other conduct, and I wanted, quite frankly, the time. And so
14 I'm going to chalk that up as, Judge Castel sentenced you with
15 regard to that and he took whatever you said into
16 consideration. I'm not going to let that -- what could be
17 viewed as you lying to him to get a better sentence, I'm not
18 going to allow that to taint my view here. And that's the
19 reason, quite frankly, because I'll tell you, I read that
20 earlier, that night, the night before the date we were here
21 before, and that morning, and I didn't feel that I was in the
22 appropriate state of mind to actually sentence you at that
23 time, because any time someone is in this courthouse or across
24 the street, I expect them to tell the truth, especially if
25 they're on the witness stand. So I take that seriously, as do

J2plscos

1 my colleagues, and I didn't want that to taint the sentencing
2 for you. So I put it over until today.

3 So I'm not going to consider that. I read it. It is
4 what it is. You were stating something and trying to -- well,
5 it is what it is. I'll just leave it at that.

6 I am going to consider also the mental health
7 assessment that was done by Carmeta Albarus, something, as I
8 mentioned earlier, that was part of the evaluation in the
9 November 1st letter submitted on your behalf.

10 And I'm now prepared to impose sentence.

11 Mr. Scott, if you could please rise for the imposition
12 of sentence.

13 It is the judgment of the Court that you be committed
14 to the custody of the Bureau of Prisons for a period of 240
15 months. That term is to be -- you may be seated. So 240
16 months, as I calculate it, is 25 years. That term is going to
17 run consecutively to your current sentence.

18 MR. DiMASE: Your Honor, I think that's 20 years.

19 THE COURT: Oh, I'm sorry. 300 months. You're right.
20 300 months. I apologize. 300 months, which is 25 years.

21 That term will be run consecutively to the term of
22 imprisonment you're currently serving. That term of
23 imprisonment consists of 20 years on Count One and 30 years on
24 Count Two, to run concurrently with one another.

25 I'll also impose three years of supervised release.

J2plscos

1 I believe that this sentence is sufficient but not
2 greater than necessary to comply with the purposes of
3 sentencing set forth in 18 United States Code Section 3553(a).
4 There will be no fine because the probation department does not
5 recommend a fine because of your limited financial situation.
6 However, you must pay a mandatory special assessment of \$100 on
7 each count, for a total of \$200.

8 With regard to the terms of your supervised release,
9 the standard conditions will apply, as well as the special
10 conditions listed on pages 27 and 28 of your presentence
11 report, and the mandatory conditions on page 27.

12 Does either counsel know of any legal reason that the
13 sentence should not be imposed as stated?

14 MR. DiMASE: One moment, your Honor.

15 THE COURT: Yes.

16 (Counsel conferring)

17 THE COURT: I'm sorry. I'm sorry. I misspoke. It
18 should be 20 years on Count One, 25 years on Count Two. I
19 apologize.

20 MR. DiMASE: Concurrent to one another.

21 THE COURT: Concurrent to one another, correct, but
22 consecutive to the undischarged term of imprisonment that
23 Mr. Scott is currently serving.

24 I'm sorry, Mr. Scott. I misspoke.

25 MR. DiMASE: Thank you, your Honor. That clarified

J2p1scos

1 one issue.

2 Regarding the term of supervised release, does the
3 Court intend to impose that? I don't know if you mentioned
4 supervised release.

5 THE COURT: I did. Three years of supervised release.

6 MR. DiMASE: Okay.

7 THE COURT: With the special conditions on pages --

8 MR. DiMASE: I'm sorry. You did say that, your Honor.
9 No, I have no objections to that.

10 THE COURT: All right. Ms. Sternheim?

11 MS. STERNHEIM: No. Thank you.

12 THE COURT: All right. So that's the sentence that is
13 going to be imposed.

14 And Mr. Scott, obviously it's a long sentence. It's
15 longer than what your attorneys had requested, and no doubt
16 longer than what you expected. I didn't view, and I typically
17 don't view -- I didn't view it, obviously, as warranting that
18 you spend the rest of your life in prison. I'm hoping that
19 when you get out and you'll be -- you won't be old, I'm not
20 going to say you'll be old, because you'll probably be as old
21 as I am now and I don't view myself as old, but I hope that you
22 use your time in prison to benefit yourself, both in terms of
23 both mentally and your education but also in terms of coming to
24 terms with yourself and also with your family. Look, they're
25 here supporting you. You have kids who, although it will be

J2p1scos

1 difficult, I encourage you to try and be a part of their lives
2 as they're growing up.

3 All right. So you have the right to appeal your
4 conviction and sentence to the extent it's consistent with the
5 plea agreement here. The notice of appeal must be filed within
6 14 days of the judgment of conviction. If you're not able to
7 pay the cost of an appeal, you may apply for leave to appeal *in*
8 *forma pauperis*. If you request, the clerk of the court will
9 prepare and file a notice of appeal on your behalf.

10 Now I'm going to dismiss the underlying indictments
11 and any open counts in this case.

12 Are there any other applications? From the
13 government?

14 MR. DiMASE: Your Honor, the government is not seeking
15 forfeiture, but as we indicated earlier in the proceeding, we
16 would ask the Court to indicate that it is going to include a
17 restitution obligation. We will submit a letter to the Court
18 indicating what, if any, costs there are for the burial and
19 funeral of the victim. If there are none, obviously there
20 won't be a restitution order.

21 THE COURT: So I will impose restitution in the amount
22 with regard to the burial and funeral of Mr. Thomas, and the
23 government has 30 days within which to provide me with an order
24 to the extent that there are such costs, after consulting with
25 Ms. Sternheim.

J2p1scos

Ms. Sternheim.

MS. STERNHEIM: Yes, your Honor. I would ask the Court to recommend a designation close to the metropolitan area so that Mr. Scott can maintain contact with his children and other family members.

THE COURT: I will do that, and I'll recommend that Mr. Scott be housed in the New York metropolitan area, or, at a minimum, in the northeast.

Now, Mr. Scott, that's just a recommendation. The Bureau of Prisons will make the ultimate decision about that, but that is what I'm going to recommend.

Anything else?

MS. STERNHEIM: No. Thank you.

THE COURT: All right. Thank you very much. We'll stand adjourned.

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